

1991

## Pratt v. Prodata : Brief of Appellee

Utah Supreme Court

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BRIEF

DOCKET NO.

910248

IN THE UTAH SUPREME COURT

JOHN P. PRATT,

Plaintiff  
and  
Appellee,

vs.

PRODATA, INC, and WILL MCCOY,

Defendants  
and  
Appellants.

Case No. 910248

Priority No. 16

Appeal from the Third Judicial District Court  
Salt Lake County, State of Utah  
Honorable J. Dennis Frederick

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UTAH

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2. Testimony of Pratt (Transcript pp. 3-13, 23, 39-40, and 82-83)
3. Testimony of Eugene H. Findlay (Transcript p. 102)
4. Testimony of Christopher Franklin Crocker (Transcript pp. 120 and 122)
5. Testimony of McCoy (Transcript pp. 130, 135-50, 152, 165-66, and 170)
6. Testimony of Roger L. Clawson (Transcript pp. 193-94)
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## I. JURISDICTION

The Court has jurisdiction over this appeal under Section 78-2-2(3)(j), Utah Code Annotated.

## II. STATEMENT OF THE ISSUES

1. Did the District Court commit error in failing to enter judgment as a matter of law in favor of the defendants/appellants Prodata, Inc. ("Prodata") and Will McCoy ("McCoy") based upon their post-trial contention that they conveyed only truthful information?

Standard of Review: No deference is given to the trial court's view of the law, but the appellate court reviews it for correctness. Ron Case Roofing & Asphalt Paving, Inc. v. Blomquist, 773, P.2d 1382, 1385 (Utah 1989).

2. When viewed in the light most favorable to the plaintiff/appellee, John P. Pratt ("Pratt"), was the evidence sufficient to support the jury's finding that Prodata and McCoy acted for an improper purpose in interfering with Pratt's economic relations with the Utah Department of Transportation ("UDOT")? (Special Verdict Question No. 2.)

Standard of Review: Sufficiency of the evidence when viewed in the light most favorable to the party who prevailed. Hansen v. Stewart, 761 P.2d 14, 17 (Utah 1988).

3. When viewed in the light most favorable to Pratt, was the evidence sufficient to support the jury's finding that Prodata's and McCoy's intentional interference with Pratt's economic relations with UDOT proximately caused an injury to Pratt? (Special Verdict Question No. 4.)

Standard of Review: Sufficiency of the evidence when viewed in the light most favorable to the party who prevailed. Hansen v. Stewart, 761 P.2d 14, 17 (Utah 1988).

4. When viewed in the light most favorable to Pratt, was the evidence sufficient to support the jury's finding that Prodata and McCoy were not privileged to interfere with Pratt's economic relations with UDOT? (Special Verdict Question No. 5.)

Standard of Review: Sufficiency of the evidence when viewed in the light most favorable to the party who prevailed. Hansen v. Stewart, 761 P.2d 14, 17 (Utah 1988).

5. When viewed in the light most favorable to Pratt, was the evidence sufficient to support the jury's finding that Pratt did not recognize the risk of harm to himself by reason of the actions of Prodata and McCoy and thereafter intentionally or heedlessly fail to protect his own interests? (Special Verdict Question No. 6.)

Standard of Review: Sufficiency of the evidence when viewed in the light most favorable to the party who prevailed. Hansen v. Stewart, 761 P.2d 14, 17 (Utah 1988).



6. When viewed in the light most favorable to Pratt, was the evidence sufficient to support the jury's finding that Prodata suffered no actual damages by reason of Pratt's breach of the noncompetition clause in the Employee Agreement? (Special Verdict Question No. 10.)

Standard of Review: Sufficiency of the evidence when viewed in the light most favorable to the party who prevailed. Hansen v. Stewart, 761 P.2d 14, 17 (Utah 1988).

### III. DETERMINATIVE LAW

There is no constitutional provision, statute, ordinance, rule, or regulation whose interpretation is determinative of the issues on this appeal.

### IV. STATEMENT OF THE CASE

#### A. Nature of the Case

The plaintiff/appellee, John P. Pratt ("Pratt"), brought this action against the defendants/appellants Prodata, Inc. ("Prodata") and Will McCoy ("McCoy") for intentional interference with Pratt's economic relations with the Utah Department of Transportation ("UDOT"). Pratt also requested a declaratory judgment (1) that a 1985 "Non-Disclosure/Non-Competitive Employment Agreement" between Pratt and Prodata (the "Employee Agreement") was modified and/or superseded by a subsequent "Type 3 - Independent Contractor Services Subcontract Services Agreement" between

the same parties (the "Subcontractor Agreement"), and (2) that he had not violated his contractual obligations under either of these agreements. (R. 2-13 and 45-61)<sup>1</sup>

Prodata and McCoy denied that they had interfered with Pratt's economic relations and also set forth several affirmative defenses to Pratt's claims, including that they were privileged to act as they did and that Pratt himself had been the cause of his own injury. Prodata also asserted a counterclaim against Pratt, alleging that Pratt had breached the non-compete provisions of the Employee Agreement and requesting an award of \$25,000 in liquidated damages. (R. 90-104.) Pratt denied that he had any liability under the Employee Agreement and alleged by way of affirmative defense that such agreement had been modified and/or superseded by the subsequent Subcontractor Agreement. (R. 69-74.)<sup>2</sup>

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<sup>1</sup>All references to the original record are in the form "R." followed by the page numbers. Similarly, references to the Reporter's transcript are in the form "T." followed by the page numbers. Trial Exhibits are referred to as "Ex." followed by the Exhibit number. Materials included in an Addendum to this brief are, in addition, identified as "Addendum" followed by the Addendum number.

<sup>2</sup>Prodata's and McCoy's affirmative defenses of privilege and causation, together with Prodata's request for liquidated damages, were first asserted in a "Proposed Amended Answer and Counterclaim" filed on August 24, 1990. (R. 90-104.) Although filed pursuant to a Stipulation between the parties (R. 88-89), this amended pleading was never served upon Pratt, and Pratt never filed an amended Reply thereto. Nevertheless, the new issues raised by the amended pleading, as well as Pratt's additional defenses thereto (including Pratt's affirmative assertion that he was not liable for the specified liquidated damages), were

B. Course of Proceedings

This case was tried to a jury on March 19-21, 1991. (R. 836.) The District Court directed a verdict in favor of Prodata and McCoy as to Pratt's claim for declaratory relief. (T. 405-06, R. 756-58.) The jury thereafter returned a Special Verdict in favor of Pratt both on Pratt's interference claim and on Prodata's counterclaim. (R. 700-04; Addendum 1.)<sup>3</sup>

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deemed to have been properly and timely asserted. (See, e.g., R. 733 and 745.)

<sup>3</sup>Just prior to trial, the District Court ruled that Pratt's proof of the "improper means" element in connection with his interference claim required proof of "each of the relevant elements of an independent tort by the standard of proof applicable to that tort under Utah law." (R. 538-39.) It is submitted that this ruling is directly contrary to the Oregon rule which was expressly adopted by this Court. Leigh Furniture & Carpet Co. v. Isom, 657 P.2d 293, 304 (Utah 1982) (Oregon definition expressly adopted); Top Service Body Shop, Inc. v. Allstate Ins. Co., 283 Or. 201, 582 P.2d 1365, 1371 n. 11 (1978) (proof of all elements of liability for another tort is not necessary). Then, prior to instructing the jury, the District Court ruled that the only independent tort which had been adequately alleged by Pratt in his pleadings was that of intentional misrepresentation. (T. 405-08, R. 756-58.) The District Court accordingly instructed the jury that they could only find that Prodata and McCoy used "improper means" if they found that Pratt had proven certain elements of the independent tort of intentional misrepresentation by clear and convincing evidence. (R. 727-32; Addendum 11.) Pratt maintains that these rulings were clearly erroneous and improperly increased his burden of proof in this case. (T. 408-09, R. 527-35.) Should this Court decide that further trial court proceedings are required in this case, therefore, appropriate clarification of these central issues is respectfully requested.

C. Disposition in the District Court

In accordance with the jury's verdict, Judgment was entered in favor of Pratt on March 27, 1991. (R. 759-60.) Prodata and McCoy moved for judgment notwithstanding the verdict, or in the alternative, for a new trial. (R. 765-67.) Their motion was denied by the District Court (R. 824-26), and Prodata and McCoy filed this appeal. (R. 827-28.)

D. Statement of the Facts

Pratt is a computer consultant with over fifteen years of experience. (T. 1 and 13-14.) During that time, Pratt has become acquainted with some of the data processing personnel who now work for the Utah Department of Transportation ("UDOT") (T. 23), and Pratt's skills are highly regarded by them. (T. 328.)

In September of 1985, Pratt became employed by Prodata to provide data processing services. (T. 14.) In connection with this employment, Pratt signed an "Employee Non-Disclosure/Non-Competitive Employment Agreement" (the "Employee Agreement"). (T. 14-15, Ex. 11.) Among other things, the Employee Agreement prohibited Pratt from forming or otherwise participating in a competing business within 50 miles of Salt Lake City for one year following the termination of his employment. (Ex. 11, paragraph 9.)

By written notice to Prodata, Pratt terminated the Employee Agreement effective May 1, 1988. (T. 15.)

Nevertheless, Prodata wanted Pratt's continued work on a project for the Utah Department of Employment Security ("UDES"). Therefore, Prodata thereafter signed a "Type 3 - Independent Contractor Services Subcontract Services Agreement" with Pratt (the "Subcontractor Agreement") to obtain Pratt's continuing services. (T. 16-19.) The Subcontractor Agreement did not require Pratt to work exclusively for Prodata and did not guarantee Pratt full time work. Rather, the Subcontractor Agreement acknowledged and engaged Pratt as an independent business providing competing services. The Subcontractor Agreement did, however, prohibit Pratt, for a period of six months after the termination of the Subcontractor Agreement, from competing with Prodata at the specific clients which were serviced by Pratt under the Agreement. (T. 22-23 and 167, Ex. 14.)

In engaging Pratt under the Subcontractor Agreement, Prodata required Pratt to operate as a competing business, something which would otherwise have violated the Employee Agreement. (T. 19-20.) Pratt accordingly believed that the Subcontractor Agreement superseded his non-compete obligations under the Employee Agreement. (T. 20.)<sup>4</sup>

Pratt terminated his Subcontractor Agreement with Prodata effective March 29, 1989. (T. 21-22, Ex. 26.)

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<sup>4</sup>See, e.g., Bradshaw v. Burningham, 671 P.2d 196 (Utah 1983).

Pratt was asked by UDOT personnel to do some contract work at UDOT. (T. 23.) Pratt agreed and commenced providing services to UDOT on or about February 27, 1989. (T. 23-24.) While engaged by Prodata under the Subcontractor Agreement, Pratt performed work exclusively for UDES. (T. 20-21.) He performed no work for UDOT. (T. 23.) The parties accordingly agree that Pratt did not violate his Subcontractor Agreement by subsequently providing services to UDOT. (T. 22-23 and 129-30.)

Pratt's departure from Prodata had no adverse effect upon the continuing work being done by Prodata at UDES. (T. 206.) Likewise, Pratt's subsequent work at UDOT did not hinder Prodata from performing work for UDOT during the same time period. (T. 153-54 and 165-66.) Nevertheless, McCoy, who was then Prodata's City Manager for Salt Lake City, was very unhappy with Pratt for leaving Prodata. (T. 193-94.) McCoy even told at least one Prodata employee to stay away from Pratt and openly accused Pratt of bad or unethical conduct (T. 202), although McCoy admits he knew of nothing bad Pratt had done. (T. 170.)

During the summer of 1989, McCoy carefully reviewed Pratt's agreements with Prodata. As a result, McCoy concluded that Pratt had not violated his agreements. (T. 134-36.) In fact, McCoy admits that he did not become aware of any basis for asserting a contract violation on the part of Pratt until September 26, 1989. (T. 136-40.)

Nevertheless, as early as June of 1989, McCoy referred to Pratt as having taken contract work away from Prodata, and McCoy openly stated that Prodata was going to "make an example" of Pratt. (T. 122-23.)

In September of 1989, McCoy and Prodata learned that another former Prodata employee, Ron Hartle ("Hartle"), was providing services to UDOT. McCoy and Prodata believed that Hartle was in breach of his non-compete agreement with Prodata by so doing. Prodata's President, Bill Basham ("Basham"), told Hartle that Prodata would get Hartle out of UDOT using "whatever means he could." (T. 285-86.)

McCoy had previously been employed as the Comptroller for UDOT. (T. 127.) He knew the UDOT personnel. (T. 166-67.) Treating Hartle and Pratt as a package (T. 152), McCoy met with UDOT officials on several occasions to discuss Hartle and Pratt. (T. 137-50.) At McCoy's request, UDOT conducted "an investigation" into the alleged non-compete violations using information supplied by McCoy. (T. 370-75.) UDOT ultimately consummated a "business arrangement" with McCoy to "clear up the matter." (T. 278-79.)

On October 2, 1989, the next business day, Pratt was summoned to the office of Neal Christensen, UDOT's Director of Administrative Services. Pratt was told that he was being terminated by UDOT effective immediately. (T. 2.) When he asked the reason, Pratt was told that he was being

terminated because of a conflict with Prodata and that he would not be considered for further work at UDOT until his differences with Prodata were resolved. (T. 3.)

Pratt was totally surprised by UDOT's termination of his contract. He was not aware of any conflict he had with Prodata. (T. 3, 39-40.) In an effort to resolve the matter, Pratt arranged to meet with McCoy. McCoy told Pratt that he would clear Pratt for further work at UDOT if Pratt paid Prodata approximately \$4,000. Pratt was shocked; he did not believe he owed Prodata anything and regarded the request as extortionate. (T. 4 and 65.) After Pratt left this meeting, McCoy was visibly pleased that Pratt would have to pay Prodata. (T. 120.)

Pratt subsequently tried to resolve the matter with UDOT. Although UDOT personnel had freely met with and listened to McCoy, UDOT personnel would not listen to Pratt. (T. 4-13.) The sudden termination of Pratt's contract with UDOT left Pratt without work for several weeks. (T. 40-41 and 84-85.) Pratt ultimately succeeded in obtaining other work; however, Pratt was not permitted to do further work for UDOT. (T. 42-43.) Pratt finally commenced this civil action in an effort to resolve the matter. (T. 13.)



## V. SUMMARY OF ARGUMENTS

### A. Pratt's Interference Claim

#### 1. Improper Purpose and Privilege

McCoy expressed groundless displeasure toward and criticism of Pratt over a period of several months. McCoy accused Pratt of taking contract work from Prodata and threatened to "make an example" of him many months before McCoy admittedly had any information which suggested to him that Pratt had done anything whatsoever improper. Neither Prodata nor McCoy ever approached Pratt about any alleged violation of his contract. Instead, they were intent on simply getting Pratt (with Hartle) out of UDOT no matter what it took. It was clearly an afterthought to use Pratt's alleged earlier violation of his then-expired non-compete obligation as a business justification for interfering with Pratt's ongoing contract work for UDOT.

#### 2. Causation

After Prodata and McCoy had intentionally interfered with Pratt's contract with UDOT, Pratt did all he could to resolve the matter with both Prodata and UDOT. Prodata and McCoy were ostensibly willing to clear Pratt for further work at UDOT if Pratt would only pay them money. However, Pratt did not believe he owed Prodata any money. Pratt certainly did not himself become a cause of the resulting injury to him simply because he would not make a requested

payment to Prodata, the party whose intentional conduct had caused the injury in the first place.

3. Truthful Communication

In view of their improper purpose in interfering with Pratt's contract with UDOT, Prodata and McCoy cannot avoid liability for their intentional interference simply because the means they purportedly employed (i.e., transmitting only truthful information) was allegedly proper. Moreover, there was no finding by the jury that Prodata and McCoy actually communicated "only truthful information to UDOT." In fact, this new defense was never raised before trial at all and is not properly before the Court on this appeal.

B. Prodata's Counterclaim

There was substantial evidence to support the jury's finding that Prodata suffered no damages by reason of Pratt's alleged breach of his non-compete obligation. There was also substantial evidence that any actual damages suffered by Prodata were de minimis and grossly disproportionate to the specified liquidated damages.

VI. ARGUMENT

This Court has repeatedly "pointed out the importance of affording parties who desire it a trial by jury; and that the courts should exercise caution and reluctance in interfering with them." Schow v. Guardtone, Inc., 18 Utah 2d 135, 417 P.2d 643, 646 (1966). Prodata and McCoy assert

no basis which would justify disturbing the jury's verdict in this case.

A. The District Court's Judgment on Pratt's Interference Claim Should Be Affirmed.

It is well established that a defendant is liable under Utah law for intentional interference with prospective economic relations if it is proven "(1) that the defendant intentionally interfered with the plaintiff's existing or potential economic relations, (2) for an improper purpose or by improper means, (3) causing injury to the plaintiff." Leigh Furniture & Carpet Co. v. Isom, 657 P.2d 293, 304 (Utah 1982). See also, Sampson v. Richins, 770 P.2d 998 (Utah App.), cert. denied, 776 P.2d 916 (Utah 1989).

While a defendant may prove a limited privilege for his actions by way of affirmative defense, it is likewise clear that any such privilege is not absolute. As aptly noted by the Supreme Court of Oregon, "[e]ven a recognized privilege may be overcome when the means used by defendant are not justified by the reason for recognizing the privilege." Top Service Body Shop, Inc. v. Allstate Insurance Co., 283 Or. 201, 582 P.2d 1365, 1371 (1978) (case cited with approval by this Court in adopting the Oregon approach to this tort, see Leigh Furniture, supra, 657 P.2d at 304.) See also, Sloan v. Journal Publishing Co., 213 Or. 324, 324 P.2d 449, 465 (1958) (defense of

privilege rejected, stating: "We find no justification for coercive tactics by the defendants, the effect of which is first to invade the exclusive functions of management and second to destroy profitable contractual rights of third parties, the plaintiffs.") Similarly, courts in other states have declined to recognize a privilege to interfere with the economic relations of another when such interference is motivated by a desire to injure or is accomplished by improper means. See, e.g., Alyeska Pipeline Service Co. v. Aurora Air Service, Inc., 604 P.2d 1090, 1093-94 (Alaska 1979) (the Court also noted that "[t]he question of justification for invading the contractual interest of another is normally one for the trier of fact, particularly when the evidence is in conflict"); Buckaloo v. Johnson, 14 Cal. 3d 815, 537 P.2d 865, 872, 122 Cal. Rptr. 745 (1975). See also, Edwards v. Anaconda Co., 115 Ariz. 313, 565 P.2d 190, 193 (Ariz. App. 1977) ("This competitor's privilege does not apply to inducement of breach of contract but only to interference with business expectancies.").

1. There is Substantial Evidence to Support the Jury's Finding That Prodata and McCoy Acted for an "Improper Purpose" and Were Not "Privileged."

Over a period of several months, McCoy expressed anger, implied improper conduct, alleged contractual violations, and threatened to take action against Pratt,

for which there was admittedly no known factual or legal basis. Such conduct evidences ill will and an intent to injure Pratt for the sake of injury alone, rather than an intent merely to protect some legitimate business interest.

For example, Mr. Clawson testified that McCoy was "very unhappy" at Pratt in February of 1989 when Pratt terminated his Subcontractor Agreement and left Prodata. (T. 193-94; Addendum 6.) There was clearly no legitimate business reason for this unhappiness. Pratt was unquestionably entitled to terminate his Subcontractor Agreement, and Mr. Read testified that the Prodata project on which Pratt had been working was not adversely affected at all. (T. 206; Addendum 7.)

Similarly, Mr. Read testified that McCoy told him in April or May of 1989 to "stay away" from Pratt and that Pratt had done worse things than anything Mr. Read knew about. (T. 202; Addendum 7.) This apparent attempt to discredit Pratt was likewise not justified by any business purpose; Defendant McCoy admitted that he knew of nothing whatsoever Pratt had done which McCoy would consider bad. (T. 170; Addendum 5.)

Then, according to Mr. Crocker, McCoy referred to Pratt in about June of 1989, accusing him of taking contracts away from Prodata and violating his non-compete obligation to Prodata, stating that Prodata was going to "make an example" of Pratt. (T. 122; Addendum 4.) By his

own admission, however, McCoy knew of no factual basis for claiming a contract violation by Pratt until September 26, 1989. (T. 135-36; Addendum 5.)

Mr. Hartle testified that Prodata and McCoy specifically told him they were going to get him out of UDOT by "whatever means [they] could." (T. 286; Addendum 9.) From the defendants' admitted package treatment of Mr. Hartle and Pratt (T. 152; Addendum 5), therefore, it could reasonably be inferred that Prodata and McCoy had the same intent with respect to Pratt. In addition, Pratt met with McCoy after Pratt's contract at UDOT was terminated (T. 4; Addendum 2); and, according to Mr. Crocker, McCoy was visibly pleased after meeting with Pratt and announcing that Pratt would have to pay Prodata money. (T. 120; Addendum 4.)

Further, although McCoy repeatedly met with and told others that he thought Pratt had violated his contract with Prodata, Prodata and McCoy admittedly never contacted Pratt about any alleged contract violation. (T. 130; Addendum 5.) Instead, as Mr. Charles Christensen testified, McCoy said he made a "business arrangement" with UDOT to "clear up the matter." (T. 279; Addendum 8.) Other than this lawsuit, the only contact between Pratt and Prodata and McCoy concerning the alleged "problem" was initiated by Pratt. (T. 39-40; Addendum 2.)

Thus, although Prodata and McCoy claim that they were merely pursuing a legitimate business and economic objective of enforcing their employee and subcontractor agreements, there is substantial evidence that this alleged objective was in reality an afterthought. Much of the conduct of Prodata and McCoy referred to above admittedly took place before Prodata and McCoy were aware of any need to pursue their claimed objective, and any such objective cannot, therefore, justify such conduct. Rather, Prodata's and McCoy's conduct leads one to the inescapable conclusion that Prodata and McCoy harbored ill feelings towards Pratt and were intent on injuring and "making an example" of him without any regard to whether there was a legitimate basis for their action.

Quoting the Alaska Supreme Court, this Court in Leigh Furniture aptly explained:

[I]f one does not act in a good faith attempt to protect his own interest or that of another but, rather, is motivated by a desire to injure the contract party, he forfeits the immunity afforded by the privilege. . . . In the case at bar, the central factual issue . . . was whether Alyeska was genuinely furthering its own economic and safety interests or was using them as a facade for inflicting injury upon Aurora. There was sufficient evidence upon which the jury could properly find that Alyeska was acting out of ill will towards Aurora, rather than to protect a legitimate business interest.

Leigh Furniture and Carpet Co. v. Isom, 657 P.2d 293, 308 (Utah 1982) (Emphasis in original; quoting Alyeska Pipeline Service Co. v. Aurora Air Service, Inc., 604 P.2d 1090,

1094 (Alaska 1979)). Likewise in this case, there is clearly substantial evidence to support the jury's finding that Prodata and McCoy acted for an "improper purpose" and were not "privileged."

2. There is Substantial Evidence to Support the Jury's Finding That the Conduct of Prodata and McCoy Proximately Caused an Injury to Pratt.

It is undisputed that UDOT based its decision to terminate Pratt's contract solely upon information provided by Prodata and McCoy. (T. 370-75; Addendum 10.) Moreover, UDOT's Director, Mr. Findlay, testified that Pratt's contract with UDOT would not have been terminated if it had not been for the alleged conflict between Pratt and Prodata. (T. 102; Addendum 3.)

In addition, UDOT officials had several meetings with McCoy prior to terminating Pratt's contract, and they also reported the termination to Prodata and McCoy afterwards. (T. 137-50; Addendum 5.) UDOT obviously wanted input from Prodata and McCoy and believed they had an interest in the matter. At the same time, it is undisputed that Pratt was neither informed nor asked about the proposed contract termination before it became effective. (T. 3; Addendum 2.) There can be no doubt that Pratt's contract with UDOT would not have been terminated absent the conduct of Prodata and McCoy.

Prodata and McCoy do not challenge the jury's finding that they intentionally interfered with Pratt's economic



relations with UDOT. In fact, they now admit that their conduct actually caused the termination of Pratt's contract with UDOT. (Brief of Appellants at p. 29.) Nevertheless, Prodata and McCoy contend that Pratt is somehow himself the cause of any damages he suffered because he did not accept their "offer" of settlement.

It is undisputed that Pratt contacted both UDOT and McCoy in an effort to resolve this matter. McCoy demanded a "settlement" payment from Pratt which he did not believe he owed. Pratt accordingly concluded that further discussions with Prodata and McCoy would be unproductive, and such discussions were likewise not pursued further by Prodata and McCoy. Nevertheless, Pratt thereafter tried for several months to resolve the matter directly with UDOT. Only after those efforts failed did Pratt resort to litigation. (T. 4-13; Addendum 2.)

Contrary to the assertions of Prodata and McCoy, therefore, there is absolutely no evidence that Pratt "intentionally or heedlessly" failed to protect his own interests. On the contrary, there is substantial, if not uncontroverted, evidence that Pratt undertook reasonable efforts to remedy the termination of his contract at UDOT and thereafter initiated litigation only when those efforts failed.

3. The Alleged Transmission of Only Truthful Information Does Not Relieve Prodata and McCoy From Liability in This Case.

Prodata and McCoy urge that they are immune from liability for intentional interference with Pratt's economic relations because they transmitted only truthful information. This contention must, however, fail for at least three reasons.

First, Prodata and McCoy apparently assert that their allegedly "proper means" (transmitting truthful information) cures any "improper purpose." Such a position is, however, contrary to established Utah law. As this Court has clearly explained,

The alternative of improper purpose (or motive, intent, or objective) will support a cause of action for intentional interference with prospective economic relations even where the defendant's means were proper.

Leigh Furniture, supra, 657 P.2d at 307 (Emphasis supplied). It is accordingly submitted that the argument of Prodata and McCoy confuses the "improper means" and "improper purpose" alternatives. The jury having found that Prodata and McCoy had an "improper purpose," the alleged propriety of their "means" (transmitting truthful information) is wholly irrelevant.

Second, the jury did not make the necessary factual finding to support this contention of Prodata and McCoy. The jury was asked to determine whether Pratt had proven by clear and convincing evidence that Prodata and McCoy

knowingly made a false statement of fact to UDOT. (R. 700-04 and 727-32; Addenda 1 and 11.) The jury's negative finding on that issue, however, does not equate to the asserted affirmative finding that Prodata and McCoy conveyed "only truthful information." That issue was never submitted to the jury for determination.

Finally, the arguments made to the District Court suggest that Prodata and McCoy regard "truthfulness" as a new affirmative defense. (R. 811-14.) To the extent this is so, such a defense was neither raised by the pleadings nor urged as a basis for instructing the jury. It is respectfully submitted, therefore, that any such defense has been waived and is not properly before this Court on appeal. See, e.g., Utah R. Civ. P. 8(c) and 51.

B. There is Substantial Evidence to Support the Judgment in Pratt's Favor on the Counterclaim.

Even assuming that Pratt performed services at UDOT for approximately two months during which he was obligated not to compete with Prodata, Pratt is not liable for liquidated damages if: (1) Prodata suffered no actual damages or (2) the specified liquidated damages are excessive in view of the actual damages. Young Electric Sign Co. v. United Standard West, Inc., 755 P.2d 162, 164 (Utah 1988). There is sufficient evidence to justify the District Court's Judgment on either of these grounds.

For example, Mr. Read testified that the project on which Pratt was working before he left Prodata in February of 1989 was not adversely affected at all by Pratt's departure. (T. 202; Addendum 7.) There was, therefore, direct evidence that Prodata suffered no actual damages.

Pratt testified that his services were specifically requested by UDOT personnel who had known Pratt before he became associated with Prodata. (T. 23; Addendum 2.) In addition, during the same time Pratt performed work for UDOT, Prodata continued its contract work at UDOT unabated, even after Pratt's contract work at UDOT was terminated. (T. 165-66; Addendum 5.) Thus, the evidence also directly refutes any inference that Pratt traded upon Prodata's name or goodwill in obtaining his contract at UDOT or that Prodata otherwise suffered any injury to its goodwill or reputation as a result of Pratt's work.

Further, while there is no evidence that Prodata would have actually performed Pratt's 1989 contract work at UDOT, Pratt offered evidence that Prodata would only have realized about \$2,000 from such contract work done prior to May of 1989 (the period of time during which Pratt was allegedly in breach of his non-compete obligation). (T. 82-83; Addendum 2.) Thus, there is also evidence that any actual damages suffered by the defendants were grossly disproportionate to the requested \$25,000 in liquidated damages.

In view of the foregoing, there is clearly substantial evidence to support the jury's finding that the defendants suffered no actual damages.

VII. CONCLUSION

Prodata and McCoy have asserted no legitimate basis which would justify disturbing the jury's verdict and the District Court's Judgment. The Judgment of the District Court should accordingly be affirmed.

DATED this 30<sup>th</sup> day of September, 1991.

Respectfully submitted,

A handwritten signature in cursive script, appearing to read "Berne S. Broadbent", written over a horizontal line.


Berne S. Broadbent  
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Salt Lake City, Utah 84111  
Telephone: (801) 363-1800

Attorney for Appellee

CERTIFICATE OF SERVICE

I, Berne S. Broadbent, certify that on this 30<sup>th</sup> day of September, 1991, I served a copy of the attached upon Eric C. Olson, the counsel for the defendants/-appellants in this matter, by mailing it to him by first class mail with sufficient postage prepaid to the following address:

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Attorney for Appellee

Tab 1

IN THE DISTRICT COURT OF THE THIRD JUDICIAL DISTRICT  
IN AND FOR SALT LAKE COUNTY, STATE OF UTAH

-----  
JOHN P. PRATT, : SPECIAL VERDICT  
Plaintiffs, : CIVIL NO. 900902742 CV  
vs. :  
PRODATA, INC., et al., :  
Defendants. :  
-----

We, the jury, now answer the following questions as our  
~~verdict~~ verdict in this case:

1. Did the defendants intentionally interfere with the  
plaintiff's economic relations with the Utah Department of  
Transportation?

ANSWER: Yes X No       

---

If your answer to question 1 is NO, do not answer questions  
2 through 7, and proceed directly to question 8.

---

2. Did the defendants act for an improper purpose in  
interfering with the plaintiff's economic relations with the  
Utah Department of Transportation?

ANSWER: Yes X No



3. In determining whether the defendants employed improper means in interfering with the plaintiff's economic relations with the Utah Department of Transportation, please answer the following:

a. Did the defendants make a false statement about a presently existing fact to the Utah Department of Transportation?

ANSWER: Yes\_\_\_\_\_ No X

b. Did the defendants know that the statement was false or make the statement without sufficient knowledge?

ANSWER: Yes\_\_\_\_\_ No X

c. Did the defendants, in making the statement, intend to induce the Utah Department of Transportation to act in reliance on the statement?

ANSWER: Yes X No\_\_\_\_\_

d. Did the Utah Department of Transportation act with justification on the statement?

ANSWER: Yes X No\_\_\_\_\_

---

If your answer to question 2 and your answer to any of the four subparts of question 3 ~~are~~ NO, do not answer questions 4 through 7 and proceed directly to question 8.

---

4. Did the defendants' intentional interference with the plaintiff's economic relations with the Utah Department of Transportation proximately cause an injury to the plaintiff?

ANSWER: Yes X No \_\_\_\_\_

---

If your answer to question 4 is NO, do not answer questions 5 through 7 and proceed directly to question 8.

---

5. Were the defendants privileged to interfere with the plaintiff's economic relations with the Utah Department of Transportation?

ANSWER: Yes \_\_\_\_\_ No X

---

YES

If your answer to question 5 is ~~NO~~, do not answer questions 6 and 7 and proceed directly to question 8.

---

6. Did the plaintiff recognize the risk of harm to himself by reason of the defendants' actions but thereafter intentionally or heedlessly fail to protect his own interests?

ANSWER: Yes \_\_\_\_\_ No X

---

YES

If your answer to question 6 is ~~NO~~, do not answer question 7 and proceed directly to question 8.

---

7. State the amount of the plaintiff's out-of-pocket and consequential damages caused by the defendants' interference

with the plaintiff's existing or future economic relations with UDOT.

7.A. If you find punitive damages are appropriate state the amount thereof: - 0 - \$ 32,380

8. Did the defendant Prodata waive enforcement of the noncompetition clause in the Employment Agreement?

ANSWER: Yes        No X

---

If your answer to question 8 is YES, do not answer any further questions. Instead, the foreperson should sign the Special Verdict where provided below and notify the Court.

---

9. Did the defendant Prodata inexcusably delay asserting the plaintiff's breach of contract, thereby prejudicing the plaintiff?

ANSWER: Yes        No X

---

If your answer to question 9 is <sup>yes</sup>~~no~~, do not answer any further questions. Instead, the foreperson should sign the Special Verdict where provided below and notify the Court.

---

10. Did the defendant Prodata suffer actual damages by reason of the plaintiff's breach of the noncompetition clause in the Employment Agreement?

ANSWER: Yes        No X

---

If your answer to question 10 is NO, do not answer any further questions. Instead, the foreperson should sign the Special Verdict where provided below and notify the Court.

---

11. Did there exist a reasonable relationship between the \$25,000 set as liquidated damages in the Employment Agreement and the actual damages to be contemplated as arising from a breach at the time that the Employment Agreement was signed?

ANSWER: Yes\_\_\_\_\_ No\_\_\_\_\_

---

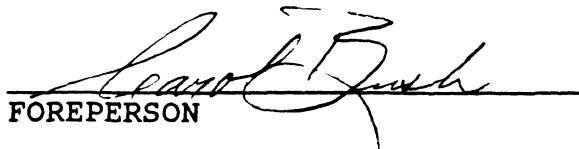
If your answer to question 11 is NO, do not answer any further questions. Instead, the foreperson should sign the Special Verdict where provided below and notify the Court.

---

12. State the defendant Prodata's damages proximately caused by the plaintiff's breach of the Employment Agreement.

\$\_\_\_\_\_

Dated this 21 day of March, 1991.

  
FOREPERSON

Tab 2

1 Mr. Christensen's office that your contract might be  
2 terminated?

3 A Absolutely none.

4 Q You had no idea that your contract was even in  
5 jeopardy?

6 A No.

7 Q At that time did you have an understanding or get  
8 an understanding from Mr. Christensen as to why your contract  
9 was being terminated?

10 A A very vague understanding, yes.

11 Q What was the understanding that you got at that  
12 time?

13 A He told me that there were some conflicts between  
14 Pro-Star and me that I needed to resolve prior to continuing  
15 my work there.

16 Q And Pro-Star is the Defendant in this case?

17 A Yes, that's correct.

18 Q Had Pro-Star ever told you that there was a con-  
19 flict between you and them that you needed to worry about?

20 A Not a word, no.

21 Q Were you aware of any conflict between you and Pro-  
22 Star?

23 A No.

24 Q So what did you do then?

25 A There wasn't much to do. I left.

1 Q Did you try to resolve things with Pro-Star?

2 A Yes, I contacted Will McCoy a couple of days later,  
3 asked him if we could have a meeting.

4 Q Did you have a meeting?

5 A We did.

6 Q And during the course of that meeting, was there  
7 some discussion about what would resolve the matter as far as  
8 Pro-Star was concerned?

9 A Yes, Pro-Star said that if I'd pay them some money,  
10 they would write a letter to UDOT clearing me.

11 Q They'd clear you to get back --

12 A Clearing me to get back in, yes.

13 Q Did you pay them some money?

14 A No, I didn't owe them anything.

15 Q Were you able to resolve anything with Pro-Star?

16 A I wasn't, no. Will McCoy told me to talk to his  
17 attorney from then on.

18 Q Did you try and do anything else to resolve this?

19 A I contacted Mr. Christensen, oh, a half dozen  
20 times, I don't recall, it may have been more than that,  
21 trying to get him to listen to reason on the thing. He  
22 basically just said until I had a letter from Pro-Star that  
23 he wasn't going to change his position.

24 Q Did you feel like he listened to your position?

25 A Not at all.

1 MR. BROADBENT: Your Honor, may I approach the  
2 witness?

3 THE COURT: You may.

4 Counsel, I note there are numerous exhibits that  
5 have been premarked.

6 MR. BROADBENT: Yes.

7 THE COURT: Will there be objection to any of those  
8 exhibits being received, Counsel, that you anticipate?

9 MR. OLSON: Your Honor, we've filed with the Court  
10 a stipulation which I believe lists 17 exhibits, the first 17  
11 numbered under Plaintiff which are admitted as far as the  
12 parties are concerned.

13 MR. BROADBENT: That's correct.

14 THE COURT: Very well, Exhibits 1 through 17 are  
15 thereby admitted by stipulation.

16 MR. BROADBENT: That's right.

17 THE COURT: We need not lay foundation. Let's  
18 proceed.

19 MR. OLSON: I believe further that on all their  
20 exhibits the foundational objections have been waived and  
21 it's simply a question of relevance, I believe, which is  
22 reserved by the parties.

23 THE COURT: Very well.

24 Q (By Mr. Broadbent) Mr. Pratt, I've handed you what  
25 has been marked and by stipulation submitted as evidence in



1 this case, as Exhibit No. 8. Let me just put a copy of this  
2 exhibit so the jury can see what you're looking at.

3 Do you recognize this document?

4 A Yes, I do.

5 Q Is this a letter that you wrote?

6 A Yes, it is.

7 Q Would you read, please, the first paragraph of that  
8 letter?

9 A Yes.

10 "In light of our telephone conversation of November  
11 8 in which you stated that UDOT would not reinstate my  
12 contract, I am requesting that you put in writing the circum-  
13 stances that led to the contract cancellation."

14 Q Had you ever, in fact, asked Mr. Christensen to  
15 reinstate your contract at UDOT?

16 A Many times.

17 Q And had you told him that you had not been able to  
18 resolve anything with Pro-Star?

19 A Yes.

20 Q And he had, in fact, refused to reinstate your  
21 contract?

22 A Yes.

23 Q And in the last part of that first sentence you  
24 say, "I am requesting that you put in writing the circum-  
25 stances that led to the contract cancellation."

1           Had you ever been told what those circumstances  
2 were?

3           A     Only as I've described, in the very broadest of  
4 terms.

5           Q     Mr. Pratt, why don't you now read the next para-  
6 graph down to where it says, "Second," just all but the last  
7 sentence of the next paragraph.

8           A     "The reason for this request is two-fold. First,  
9 as I mentioned in our previous meetings, there have been  
10 rumors circulating regarding the reasons for contract termi-  
11 nation which have caused damage to my reputation as a con-  
12 tractor. These rumors abound at UDOT and have spread to  
13 other state agencies and possibly to other companies. A  
14 letter would document the real circumstances leading to the  
15 cancellation of my contract and provide written evidence that  
16 the rumors are incorrect."

17          Q     Had you personally heard rumors about your contract  
18 cancellation?

19          A     Yes, I had.

20               MR. OLSON: Your Honor, I'd like to make an objec-  
21 tion to the testimony about rumors. I think that's pretty  
22 much irrelevant.

23               THE COURT: Well, Counsel, the witness has already  
24 answered the last question.

25               MR. OLSON: Well, my objection will be on the

1 record, your Honor.

2 THE COURT: Yes.

3 Q (By Mr. Broadbent) Where you mentioned in your  
4 letter that these rumors had spread to other state  
5 agencies --

6 A Yes?

7 Q -- which other agencies had you heard these rumors  
8 at?

9 MR. OLSON: Your Honor, I again object to this line  
10 of questioning on rumors in that it's irrelevant to the  
11 claims being made in this action.

12 THE COURT: What do you claim for it, Counsel,  
13 Mr. Broadbent?

14 MR. BROADBENT: We believe that the rumor evidence  
15 here is relevant to prove intent, to prove the fact that this  
16 had some impact on his ability to get a job outside of UDOT.

17 THE COURT: I think the witness can testify as to  
18 what he deems to be damage and/or intent and/or employment  
19 prospects, but the issue of rumors circulating I deem to be  
20 irrelevant. The objection's sustained.

21 Q (By Mr. Broadbent) Would you read the last para-  
22 graph -- or the last sentence of that second paragraph?

23 A Yes. "Second, the terms of the standard contract  
24 which we both signed required 30 days written notice in order  
25 to cancel the contract."

1 Q Had you received any notice at all?

2 A No.

3 Q You hadn't received any written notice?

4 A Nothing in writing and no notice at all.

5 Q Go ahead and read on in the letter.

6 A Okay. "Please address the following issues in your  
7 letter. How did you first learn of the problem?"

8 Q Had you ever been told how they first learned of  
9 the problem?

10 A Just in that one meeting. No, I hadn't been told  
11 how they learned of it.

12 Q That was your meeting with Mr. Christensen that  
13 you've just been talking about?

14 A That's correct.

15 Q And that was just a very vague reference to some  
16 disagreements; is that about what you'd been told?

17 A Yes, yes.

18 Q Second question.

19 A "What are the specific allegations Pro-Star made?"

20 Q Were you aware or had you been told that there were  
21 some allegations Pro-Star had made? Is that why you asked  
22 that question?

23 MR. OLSON: Your Honor, I object to that. That  
24 would be hearsay, I believe, unless there's some more founda-  
25 tion laid.

1           MR. BROADBENT: I think the fact that he's heard  
2 the allegations, your Honor, is important for him seeking to  
3 resolve this with UDOT to try and find out what was the  
4 problem.

5           THE COURT: May be important, Counsel, but it  
6 doesn't solve the objection. The objection as to hearsay is  
7 sustained.

8           Q     (By Mr. Broadbent) Okay. Had you ever been told  
9 about any specific allegations Pro-Star made?

10          A     Not specifically, no.

11          Q     What's the third question?

12          A     "What is the supporting evidence?"

13          Q     Had you ever been shown any supporting evidence?

14          A     None at all.

15          Q     Had you ever seen any evidence that would support  
16 your termination of that contract?

17          A     No.

18          Q     Fourth question.

19          A     "What is UDOT's legal interest in the matter?"

20          Q     Explain to the jury why you asked that question.

21          A     The reason I asked that question is that apparently  
22 they perceived there was a problem between me and Pro-Star.  
23 In my mind, that was a problem between the two parties. I  
24 was not understanding why UDOT would jump in, terminate the  
25 contract, and then with me being economically disadvantaged

1 say, "Now, go work it out."

2 Q Go ahead and read the last question.

3 A "Why was I not allowed to answer the charges?"

4 Q Were you, in fact, not allowed to answer those  
5 charges?

6 A Never, no.

7 Q Were you ever given an opportunity to explain your  
8 position?

9 A No.

10 Q Go ahead and finish the letter, please, Mr. Pratt.

11 A "I am sure you appreciate the emotional and finan-  
12 cial difficulty that the sudden and unexpected cancellation  
13 of my contract with UDOT has caused my family and me over the  
14 past five weeks. A letter of explanation could help me sort  
15 out this problem and restore my damaged reputation. I would  
16 appreciate your prompt response."

17 Q Did you ever receive a response to this letter?

18 A I did.

19 Q I show you what's been previously marked as Exhibit  
20 10 -- pardon me, Exhibit 9. Is this a copy of the response  
21 you received?

22 A It is.

23 Q Would you read that response?

24 THE COURT: Well, Counsel, I can foresee when we  
25 get through with 35 or 36 exhibits, if the witness is going

1 to read them each to us, that we'll be here a considerable  
2 time.

3 I note for the record that you have an overhead  
4 viewer and screen which I believe all of the jurors have  
5 previously indicated they can see, so the whole purpose, it  
6 seems to me, of having the visual demonstration is to avoid  
7 the necessity of having the witness read to us what the  
8 exhibit says.

9 MR. BROADBENT: So long as all the jurors can read  
10 what's on the overhead, I have no problem.

11 THE COURT: Are there any members of the jury who  
12 cannot see or read the letter that's on the screen?

13 There are none, Counsel, so we can dispense with  
14 the reading.

15 Q (By Mr. Broadbent) Let's take just a minute then  
16 and read through that letter.

17 Mr. Pratt, in the second paragraph of this letter  
18 it indicates that he will give you a formal response to your  
19 request after he returns to the office on November 27. Did  
20 you ever get a formal response?

21 A No, I never did.

22 Q Did you ever get any response to those five ques-  
23 tions that you've mentioned in your previous letter?

24 A No response to those at all.

25 Q Did you get any other communication from UDOT?

1           A     Yes, I did. After repeated attempts to try and get  
2 something out of them, I was finally sent a letter by Neal  
3 Christensen.

4           Q     Let me show you what's been marked as Exhibit 10,  
5 and I'll pause for just a moment to allow the jury to review  
6 this letter.

7                     Is this a copy of the next response you got from  
8 UDOT?

9           A     Yes, it is.

10          Q     Were you ever able to resolve the matter with UDOT?

11          A     No.

12          Q     Has your company since done any contract work for  
13 UDOT?

14          A     No.

15          Q     To your knowledge, have there been outside consul-  
16 tants who have done work at UDOT?

17          A     Yes, several that I know.

18          Q     Did you have any other conversations with  
19 Mr. Christensen after you received this letter?

20          A     I don't recall if I had any conversations. I mean,  
21 I had enough to be satisfied that he was not going to accept  
22 anything I said and that his position was firmly fixed.

23          Q     And so what did you do next?

24          A     I came to you.

25          Q     Let's go back now, Mr. Pratt, and give the jury a



1           Q     And that's the language that you were just refer-  
2     ring to where it says that you can't compete with Pro-Star at  
3     the contractor clients that have been serviced by the  
4     subcontractor?

5           A     That's correct.

6           Q     And you hadn't done any work for UDOT?

7           A     No, I had not.

8           Q     At the time you went to UDOT, did you believe that  
9     that violated any contractual obligation that you had to  
10    Prodata?

11          A     No, I did not.

12          Q     How did your company obtain the contract to work at  
13    UDOT?

14          A     Lorin Sheffield called me and I'm not clear as to  
15    when this was, but sometime in February, and asked if I would  
16    be willing to bid on some work at UDOT.

17          Q     Who was Lorin Sheffield?

18          A     Lorin Sheffield was one of the programming managers  
19    -- I don't know his exact title -- out at the Department of  
20    Transportation and a person I've known for approximately 15  
21    years.

22          Q     Did you know him before you started working for  
23    Pro-Star?

24          A     Yes, I did.

25          Q     And when did you start working at UDOT?

1 nothing to do with that. Your friend did it to you," and I  
2 presume that he was meaning Ron Hartle.

3 I said, "You mean Ron Hartle?"

4 And he said, "That's your -- " Something to the  
5 effect, "Those are your words, not mine," and I proceeded to  
6 explain to him that it was not my understanding that Ron  
7 Hartle had done this but that -- excuse me -- Pro-Star had  
8 done it, that Will McCoy specifically had done it, and I  
9 asked them what they wanted from me. He said that if I paid  
10 him money, that they would clear me at UDOT and I could get  
11 back in.

12 Q Were there any other discussions in that meeting  
13 about your contract obligations to Pro-Star?

14 A Not to my recollection.

15 Q Okay. Have you ever believed that you have vio-  
16 lated either of your contracts with Pro-Star?

17 A No.

18 Q As you sit here today, do you believe you violated  
19 those contracts?

20 A No.

21 Q Before you filed this lawsuit, did Pro-Star take  
22 any action against you or try and pursue you for any alleged  
23 violation of the contract?

24 A Pro-Star did not do one thing, did not say one  
25 word, did not put anything in writing, did not indicate to me

1 in any way until after we filed this action that they felt  
2 like I'd violated -- well, I take that back. Until our  
3 meeting they did not indicate in any way to me that they felt  
4 I had violated my contract.

5 Q And this is a meeting that occurred when?

6 A It occurred several days after I was terminated at  
7 UDOT.

8 Q After October 2nd?

9 A Yes.

10 Q You previously referred to Ron Hartle. Would you  
11 just explain so the record's clear on that, who is Ron  
12 Hartle?

13 A Ron Hartle is a former employee of Prodata. I've  
14 known Ron for many, many years also. I've known him for  
15 about 12 or 13 years which predates either our association  
16 with Prodata. He was working at the Department of Transpor-  
17 tation at the same time I was and we were acquaintances.

18 Q At the time your contract with UDOT was terminated,  
19 did your company have other contracts that it was working on?

20 A No, we did not at that time.

21 Q What did you do after October 2nd with respect to  
22 your work?

23 A I started looking for other contracts.

24 Q Let me show you what's been marked as Exhibit 27.  
25 I ask you if you recognize that document.

1 MR. OLSON: I have nothing further.

2 THE COURT: All right. Any redirect?

3 MR. BROADBENT: Yes.

4 REDIRECT EXAMINATION

5 BY MR. BROADBENT:

6 Q Mr. Pratt, in the Complaint in this action have you  
7 alleged that you are doing business as Computer Solutions?

8 A Yes.

9 Q Have you alleged that the acts that took place at  
10 UDOT were done while you were doing business as Computer  
11 Solutions?

12 A Yes.

13 Q When you had discussions with Pro-Star about trying  
14 to resolve this, was there any discussion about them compen-  
15 sating you for losses of your contract at UDOT?

16 A I recall bringing that up and it was essentially  
17 laughed at. I mean, it was just -- they considered that to  
18 be a joke. They denied any connection whatsoever to my  
19 contract termination at UDOT and so, you know, therefore,  
20 they didn't feel there was any basis for damages, I guess.

21 Q You testified that while you were at UDOT that you  
22 were billing your time out at \$45 an hour; is that correct?

23 A That's correct.

24 Q And while you were under subcontract at least with  
25 Pro-Star you were being paid 26.50 an hour; is that right?

A Yes.

Q Was Pro-Star billing your time out at \$45 an hour under the subcontract?

A No, they weren't.

Q Do you know how much they were billing your time for?

A To the best of my recollection, it was 38.60 or something. It was a very odd amount. I think it was 38.60. I've got my calculator still.

Q Good. Let's do another calculation. What is 227 times \$38 an hour?

A 38.60. It comes out to \$8,762, \$8,762.20.

Q Did I get that right?

A Yes.

Q Okay, and you've previously done the calculation for 227 times 26.50, sixty-one fifteen fifty. What's the difference between those two, Mr. Pratt?

A \$2,646.70.

Q Twenty-seven forty-six seventy?

A That's correct.

Q So if you'd been working for Pro-Star under their subcontract for those 227 hours, they would have not made forty-one ninety-nine fifty, they would have made twenty-seven forty-six seventy; isn't that right?

A Under that subcontract, that's right.

Tab 3

1 him, how long were those meetings?

2 A Oh, anywhere from 15, 20 minutes. There may have  
3 been one that extended into an hour.

4 Q Did the fact that Mr. Pratt had a conflict or that  
5 it had been alleged that he had a conflict with Pro-Star have  
6 anything to do with your decision to terminate Mr. Pratt?

7 A Yes.

8 Q Would Mr. Pratt's contract have been terminated by  
9 UDOT if there had not been a conflict between him and Pro-  
10 Star?

11 A No, the contract would not have been terminated.

12 Q Was there some understanding in your mind as to  
13 what Mr. Pratt would have to do in order to get his contract  
14 reinstated at UDOT?

15 A Yes.

16 Q What was your understanding?

17 A Well, it was my understanding that he would have to  
18 work out an agreement with Pro-Star so that there would be no  
19 -- that he would have satisfied all of his obligations with  
20 Pro-Star so that there would be no continuing obligation  
21 there and that he would be a totally free agent then to  
22 contract in his own behalf.

23 Q And did you at any time become aware that Mr. Pratt  
24 believed that he'd done everything he could to resolve this  
25 situation?

Tab 4



1           A     John Pratt.

2           Q     And do you think the other one was Ron Hartle?

3           A     I think the other one was Ron Hartle but I'm not  
4     sure.

5           Q     Did Will McCoy ever say what happened in that  
6     meeting?

7           A     After the meeting, Mr. McCoy came out and basically  
8     addressed the individuals that were present, indicating that  
9     Mr. Pratt was going to give up his contract at UDOT and pay  
10    some form of restitution.

11          Q     But did Mr. McCoy have any particular emotion when  
12    he came out? Was he sad? Angry? Happy?

13          A     I would say --

14               MR. OLSON: Your Honor, I would like a little more  
15    foundation, and I think the question should be rephrased such  
16    that it relates to this individual's observation as opposed  
17    to simply a statement on Mr. McCoy's --

18               THE COURT: Well, the question is leading. The  
19    objection is sustained. Let's form it in a nonleading  
20    fashion, Counsel.

21          Q     (By Mr. Broadbent) Okay. Did you see Mr. McCoy  
22    express any emotion when he came out from that meeting?

23          A     In my opinion, he was quite pleased. He was  
24    smiling, laughing, seemed to be in good spirits.

25          Q     Did it appear to you that he was happy about the

1 briefly on this matter?

2 THE COURT: Very well.

3 (Whereupon, discussion was held at the bench out of  
4 the hearing of the jury and the Reporter.)

5 MR. BROADBENT: Could we approach the bench for  
6 just a moment?

7 (Whereupon, discussion was held at the bench out of  
8 the hearing of the jury and the Reporter.)

9 Q (By Mr. Broadbent) Mr. Crocker, have you now told  
10 us everything that you can remember that Pro-Star or  
11 Mr. McCoy said to you regarding John Pratt?

12 A Well, no, not really.

13 Q Specifically, and we're not interested in things  
14 that are just office conversation kinds of things, but tell  
15 us anything else that you remember that you haven't told us  
16 about already, any other statement that Mr. McCoy has made  
17 regarding John Pratt and we'll --

18 A Okay. What I have to do is back up in time. Not  
19 knowing at the time who John Pratt was and not having his  
20 name mentioned, a statement at a luncheon by Mr. McCoy and  
21 also backed up by Mr. Basham was that contractors had taken  
22 contracts, consequently, money away from Pro-Star, that they  
23 had violated their no compete clause and Pro-Star intended to  
24 make an example of them.

25 Q Do you remember when that statement was made?

Tab 5

1           A     I am not. We've given it to counsel, but as far as  
2 I know, we don't think it is. Personally, I don't think it's  
3 in violation.

4           Q     Do you remember speaking with John Pratt about a  
5 contract violation issue in October of 1989?

6           A     Yes, I do.

7           Q     And prior to that time, you hadn't spoken to  
8 Mr. Pratt at all about any possible violation of this con-  
9 tract, had you?

10          A     I had not.

11          Q     And you're not aware of anybody else at Pro-Star  
12 that contacted Mr. Pratt about a possible contract violation,  
13 are you?

14          A     No.

15          Q     Let's take our Exhibit 40 here, Mr. McCoy, just to  
16 keep these different, we'll use a different color dot, and  
17 let's put some times on this line here.

18                 If I understand the allegations that you're making  
19 in this case, it's that Mr. Pratt violated an employee agree-  
20 ment; is that right?

21          A     That is correct.

22          Q     And would you put on this chart a dot that shows  
23 when that competition clause expired, when his duty not to  
24 compete ended?

25          A     I will. As a question, is the first of the month

Q And when you advised Bill Basham, he indicated that you were to assure that you looked at the agreements and made sure there was not a violation of those agreements; isn't that true?

A That is true.

Q And you personally pulled the file in the summer of 1989, didn't you?

A That is correct.

Q And you looked at the contracts at that time?

A Correct.

Q You looked at both the employee agreement that we've talked about and the subcontractor agreement?

A Yes, we did.

Q Can you fix an exact date? Could we put a dot on this chart indicating when you reviewed the contracts or just a general time frame like this?

A It was within, I would say, a day, my first sighting of Mr. Pratt, it was basically the same time.

Q Okay, go ahead then, we'll just put this on the chart there, as well, in mid summer of 1989.

Now, when you reviewed the employee agreement and the subcontractor agreement at that time, you reached a decision as to whether there had been a violation, in your mind, hadn't you?

A In my mind, I had, yes.

Q And the decision you reached was that there had not been a violation either of those contracts; isn't that right?

A That is correct.

Q And you didn't contact your attorney at that time?

A I did not.

Q And the reason you didn't contact your attorney is because you had concluded that it was so clear there was no contract violation, you didn't see a need to contact him; isn't that right?

A That was based on the conclusion that he had actually started work in the time frame that I'd seen him at mid summer of 1989, and that's correct.

Q And that's what you say is all you know when you reviewed those contracts was that you just saw him in mid summer?

A My assumption was that that was when he started.

Q Now, you said you became aware of some additional facts about John Pratt in late September of 1989; is that correct?

A That is correct.

Q And this is when you got a letter from Ron Hartle's attorney?

A Correct.

Q And this letter from Ron Hartle's attorney mentions John Pratt, doesn't it?

A It does.

Q I believe we've referred to this. This is Exhibit 15. Is this a copy of the letter that you received from Ron Hartle's attorney?

A Yes, it is.

Q Let me refer you to the second page of this document there, the first full paragraph where it says, "There is a third reason why the noncompetition agreement is not enforceable. A subcontractor of your client by the name of John Pratt was in the same situation as Ron Hartle. Mr. Pratt's subcontract expired in February 1989. It had the same noncompetition provision in it as does Mr. Hartle's contract. In April 1989 he entered into a direct contract with UDOT for computer services," and it goes on and talks about some other things, and is that the additional information that you say you learned?

A Yes, it is.

Q And once you had received that additional information, you took some steps at that point then to do some additional investigation, didn't you?

A Yes, I did.

Q And what you did is you called the Utah Department of Transportation and tried to get some documents from them to show when he'd started work; is that right?

A That is correct.

1           Q     And you told Bill Basham that that's what you were  
2 going to do, that you were going to go to UDOT and obtain  
3 documents to see if they could indicate a possibility of a  
4 contract violation; is that right?

5           A     I'm not real sure on that. We discussed it at some  
6 time but --

7           Q     Do you remember discussing it with Bill Basham?

8           A     Yes, I did.

9           Q     Is that the gist of what -- do you have a different  
10 recollection of what was said?

11          A     It may have been after I attempted to do that, the  
12 time frame is off, but I did discuss it with him.

13          Q     And in attempting to get these documents, you  
14 contacted Lorin Sheffield; is that correct?

15          A     Originally I did ask Lorin to confirm.

16          Q     And he said he couldn't help you; is that right?

17          A     That's correct.

18          Q     And then you contacted Gary Williams in the comp-  
19 troller's office; is that right?

20          A     Yes, I attempted to contact several other people  
21 prior to that.

22          Q     And you contacted Harold Worrall also about getting  
23 these documents?

24          A     I attempted to contact Mr. Worrall first.

25          Q     And you requested invoices and payment vouchers



1 from UDOT, didn't you?

2 A Yes, I did.

3 Q And following your request, the very next day you  
4 got some of those documents; is that correct?

5 A That is correct.

6 Q And you did not have to talk to anybody at the  
7 Attorney General's Office to get those documents?

8 A I did not.

9 Q You didn't have to pay for copy costs?

10 A I did not.

11 Q After getting these documents -- let me refer you  
12 to Exhibit 1. Actually, as I remember your testimony, that  
13 probably wasn't -- let's look at Exhibit 2 instead.

14 Was this one of the documents that you got from  
15 UDOT in response to your request?

16 A Yes, it is.

17 Q And from this document, did you conclude at that  
18 point that there was a contract violation or that there  
19 appeared to be --

20 A There appeared to be a violation, yes.

21 Q And what is it on these documents that you saw that  
22 indicated there was a contract violation, in your mind?

23 A On both the first page and the second page the  
24 request is for consulting services February 27 through  
25 April 30, 1989, \$10,215.

Q And so the difference then is that you claim that here you didn't know that he was working at UDOT back in this early March, April time frame, and now you got some documents that indicated that he was; is that right?

A That is correct.

Q And so once you got those documents, that's the first time that you had any belief that there was a contract violation; is that your testimony?

A That is correct.

Q Do you remember when you got Mr. Hartle -- the letter from Mr. Hartle's attorney?

A I received it on September 26th.

Q Let's have you, Mr. McCoy, take you back to Exhibit 40, and would you put a green dot as close as we can get it to September 26th here on this time line?

A Okay.

Q Now, when you got these documents, you also learned of another problem with John Pratt's contract at UDOT, didn't you?

A I did not have evidence, but I suspected that there was something else.

Q And this additional problem had to do with the fact that he was paid without a contract being in force; is that right?

A I did not know that to be factual at that time, but

1 that was my suspicion.

2 Q And once you had that suspicion, you went to  
3 Mr. Sheffield and told him about that suspicion; isn't that  
4 right?

5 A What I did -- I'm trying to think -- with  
6 Mr. Sheffield, the first thing I did when I got the letter  
7 was updated him on Mr. Hartle again and advised him that  
8 Mr. Hartle had brought Mr. Pratt in in his response and we  
9 would be looking at that independently and advised him that I  
10 would be talking to his supervisor.

11 Q And his supervisor is Kent Nielsen?

12 A That is correct.

13 Q Or at least, was Kent Nielsen?

14 And you then did talk to his supervisor about those  
15 same issues?

16 A I did.

17 Q And did you in the course of this mention that  
18 there was a possible problem with John Pratt's contract not  
19 being in force when he was paid?

20 A I don't recall anything specific on the contract  
21 violation with either one of those individuals. I just don't  
22 recall specifically. I know I discussed the -- our contract  
3 arrangement and they talked about their concerns and we  
4 talked about what we were going to do, which basically is we  
5 were going to do nothing, we were going to allow them to work

1 in the Department. I do not recall discussing specifically  
2 anything to do with the contract violation.

3 Q And when you say contract violation, you're not  
4 talking about the contract violation alleged between you  
5 and --

6 A It was the contract in process at UDOT.

7 MR. BROADBENT: Does the Court have Mr. McCoy's  
8 original deposition? I believe it's in the packet here.

9 THE COURT: Yes, the original deposition of Will  
10 McCoy taken August 1 of 1990 is in the file with certain  
11 corrections noted on the front, Counsel. If you're moving to  
12 publish it, your motion is granted.

13 MR. BROADBENT: I would move to publish it.

14 Q (By Mr. Broadbent) Mr. McCoy, I direct your  
15 attention to page 42. Are you there on page 42?

16 A I am.

17 Q Looking at the bottom there's a question that  
18 begins on the bottom of page 42 which I'll read, and then  
19 I'll ask you to read your answer.

20 "After the question of Mr. Pratt's violation of his  
21 agreement had been raised through this letter which I believe  
22 is the letter from Mr. Hartle's attorney, that you received  
23 from Mr. Hartle's attorney, did you then meet with the people  
24 at UDOT and talk about Mr. Pratt's contractual situation?"

25 And your answer was?

1           A     Okay, would you like me to read --

2           Q     Yes, please.

3           A     Okay. "I did. I first met with Lorin Sheffield  
4 and told Lorin that Mr. Hartle, our prior discussion of me  
5 bringing him up to date with Mr. Hartle's situation had  
6 included Mr. Pratt in his defense and I assured him again  
7 that we did not want to stop the Department or prohibit them  
8 from getting their work done and we had no desire, you know,  
9 of filing restraining orders against either one. After that,  
10 I met with Mr. Nielsen and told him the same thing. I asked  
11 Mr. Nielsen if he had passed on to Mr. Christensen the  
12 situation with Mr. Hartle. At that point I had not discussed  
13 that at all with Mr. Christensen. On becoming aware of the  
14 payment with Mr. Pratt, I had some additional concerns that  
15 was -- having been the comptroller and having seen the State  
16 Policy Procurement Board -- having been on the Policy Pro-  
17 curement Board for six years, I could not understand how  
18 Mr. Pratt had contracted with the Department. I knew for a  
19 fact that he was not on the statewide contract. I had  
20 installed the controls in the financial system so that kind  
21 of thing couldn't happen."

22           Q     And you considered the payment of Mr. Pratt without  
23 a contract in force as being a violation of State procurement  
24 practices; is that correct?

25           A     That would be correct.

1           Q     And you told Mr. Nielsen that you thought UDOT was  
2 exposed politically in violating -- what you considered a  
3 violation of State procurement practices; is that right?

4           A     Again, I'm not real sure. In here I say those  
5 words, but I do not indicate that I told him, you know,  
6 looking at my notes at some -- I honestly don't know. If I  
7 did, I was aware of that, but I don't know whether I told  
8 Mr. Nielsen at that time.

9           Q     Okay. After the meeting with Mr. Nielsen, you went  
10 downstairs to see Mr. Christensen, didn't you?

11          A     I did.

12          Q     Mr. Christensen was not in; is that right?

13          A     I was on the way to his office and I did meet him  
14 in the atrium.

15          Q     Before you met him in the atrium, you ran into  
16 Harold Worrall; is that correct?

17          A     That is correct.

18          Q     And you told Mr. Worrall that there was a serious  
19 situation regarding payment to Mr. Pratt without a contract  
20 in place that he may want to explore; isn't that right?

21          A     I did not use those words. What I told Mr. Worrall  
22 was that in the situation that I had with a couple of con-  
23 tractors, I ran across some information that he should be  
24 aware of, that he should explore, and there was a possibility  
25 that a contract was entered into or services entered into

before a contract was in place. I suggested he examine that himself.

Q You say you didn't use those exact words?

A Well, you -- what was your word in the beginning?

Q You said that it was a serious situation that he may want to explore.

A Okay. I expressed it in the terms I did so --

Q Mr. Christensen then walked by and Mr. Worrall stopped him; is that right?

A That is correct.

Q And Mr. Worrall was there then, asked that the two of you meet with Mr. Christensen; is that right?

A That is correct.

Q The next day you did, in fact, meet with Mr. Christensen, didn't you?

A I did.

Q And in your meeting with Mr. Christensen you told him about John Pratt?

A I told him about three things. The first is I went through the sequence, asked if his staff had brought him up to date and had discussed with him the Hartle situation, and I went through the explanation of Mr. Hartle. I did advise him that Mr. Hartle had brought Mr. Pratt into his defense, that we did not intend to do anything with or against the Department, that we would handle things separately. I did

1 tell him that.

2 Q Now, when you started your meeting with  
3 Mr. Christensen, Mr. Worrall hadn't arrived yet, had he?

4 A That is correct.

5 Q So you had a discussion with Mr. Christensen, just  
6 the two of you; is that correct?

7 A That is correct.

8 Q And in the course of that discussion, before  
9 Mr. Worrall arrived, you told Mr. Christensen about the dates  
10 in John Pratt's contract, didn't you?

11 A Yes, I did.

12 Q You also told Mr. Christensen that there was this  
13 contracting problem, that you'd indicated a possible viola-  
14 tion of procurement practices; is that correct?

15 A That was after Mr. Worrall joined us.

16 Q And in -- okay, and then when Mr. Worrall joined  
17 you, you continued that discussion about this possible  
18 violation of procurement practices; is that right?

19 A Yes, we did have a brief discussion.

20 Q You suggested to Mr. Christensen that they may want  
21 to explore this, didn't you?

22 A I don't recall. I think Mr. Worrall was the one  
23 that -- they were the ones that discussed exploring it at  
24 that point. I don't recollect exactly what I said then.

25 Q Let's have you look at your deposition again,



Mr. McCoy, on page 58 -- I'm sorry, page 56. It's a rather lengthy answer and I don't really want to have you read the whole thing, so if Counsel doesn't have any objection, I'd like you just to continue with the paragraph that starts on line 24 of page 56, and just before you do that, let me ask you, is this answer, does it relate to this meeting we've been talking about that you had with Mr. Christensen?

A It does.

Q Take a minute if you need to and just read through.

A It does.

Q Okay, and so again, reading, if you will,

Mr. McCoy, on line 24, page 56 --

A "I explained to him the contracting process and suggested that's an area that they may want to explore because I felt that it had been breached. Mr. Worrall came in as we were talking about the contracts. Mr. Worrall expressed great concern on the -- first of all, he said that they did not have a contract in place and that payments had been made against that contract with Mr. Pratt."

Q Okay, we can stop there.

A Okay.

Q You later had another meeting with Mr. Christensen after this meeting we've been talking about; is that correct?

A That is correct.

Q And that meeting took place in your office?

1           A     It did.

2           Q     And Mr. Christensen during that meeting asked for a  
3 copy of Mr. Pratt's contract; is that correct?

4           A     It was discussed. I don't recall -- he asked for a  
5 copy of the language and I think he asked for a copy of his  
6 contract, but I know we did discuss it in some depth.

7           Q     You think he did ask for a copy of his contract?

8           A     I think he did.

9           Q     You told Mr. Christensen that you weren't going to  
10 give him copies of John Pratt's contracts; is that right?

11          A     That is correct.

12          Q     You did, however, give him copies of some forms; is  
13 that right?

14          A     That is correct.

15          Q     Do you recall what forms you gave him?

16          A     I do. I gave him copies of a standard format for  
17 what is called our Type I agreement, that is, an employment  
18 agreement for full-time employed, salaried person. Origini-  
19 nally I thought I had given him a copy of our Type III, which  
20 is our subcontract agreement.

21                During the course of events here, I recalled that  
22 it was actually a Type II contract agreement which is a part-  
23 time employee and told him that the language used in the  
24 noncompete was similar or the same as the language used in  
25 the subcontract. I also told him that Mr. Pratt's contract

was different, was not exactly the same wording as the wording that I was giving him.

Q You then asked Mr. Christensen what he was going to do about Ron Hartle and John Pratt, didn't you?

A I did not ask that. I asked what he was going to do next.

Q Let's have you look on page 59 of your deposition.

A Okay.

Q Again, there is a fairly lengthy answer and I don't want you to have to read the entire thing. Is this answer, does it relate to this meeting that we've been talking about with you and Mr. Christensen?

A It does.

Q Would you begin, just read the last paragraph of your answer that begins on line 11 on page 59?

A Okay. The one that starts, "So they were not identical"?

Q Yes.

A "So they were not identical, but it was the type of agreement that we signed with all of our people without exception. I asked him at that time, I tried to get an idea where he was at and what he was going to do, and his comment was that they were still researching it and analyzing it and he wasn't at liberty to discuss any more."

Q When you say you tried to get an idea of where he

1 was at and what he was going to do, that has reference to  
2 what he was going to do about the John Pratt and Ron Hartle  
3 situation; isn't that right?

4 A It was that, the contracting situation, yes.

5 Q You then had another contact with Mr. Christensen  
6 of UDOT on the following Monday, October 2nd; is that  
7 correct?

8 A That is correct.

9 Q And Mr. Christensen called you and reported what  
10 he'd done about Ron Hartle and John Pratt; is that correct?

11 A Mr. Christensen called several times. We played  
12 telephone tag. When we finally did talk, he asked if I could  
13 come in and talk. He advised me what he had done with  
14 Mr. Hartle and Mr. Pratt and advised me that our contracts  
15 would also cease.

16 Q Mr. McCoy, John Pratt gave written notice of  
17 terminating his subcontract agreement, didn't he?

18 A Yes, he did.

19 Q And the notice was given on or about February 27th;  
20 is that right?

21 A That is correct.

22 Q And so his subcontract terminated 30 days later, on  
23 or about March 29th of 1989; is that right?

24 A That is correct.

25 Q And so he had a noncompete agreement in the

1           A     Would you restate your question? I'm concerned  
2 about the time frame because --

3           Q     Okay. At no time have you ever told anyone at UDOT  
4 that Mr. Pratt's contract, his noncompetition obligation to  
5 Pro-Star had lapsed when they terminated him; is that  
6 correct?

7           A     That's correct.

8           Q     Now, when you found out about Mr. Pratt, you had  
9 already had some discussions with people at UDOT about  
10 Mr. Hartle; is that right?

11          A     That is correct.

12          Q     And after you found out about Mr. Pratt, you  
13 basically talked about Mr. Pratt and Mr. Hartle together when  
14 you talked to people at UDOT; is that correct?

15          A     That is correct. The time period was very, very  
16 short.

17          Q     As your attorney said yesterday, you basically  
18 dealt with him as a package; is that correct?

19          A     That is correct.

20          Q     And all of your relationships and conversations  
21 with UDOT in this time frame we've been talking about, and,  
22 in fact, since January of 1989, have been on behalf of Pro-  
23 Star; is that correct?

24          A     That is correct.

25          Q     Let me refer you now to Exhibit 30 to begin with.

it with out attorney and that we were concerned with the no compete issue being consistent and that he could call the attorney. I gave him Eric's name, the company and telephone number. Mr. Pratt left and that's the last contact I really had, other than just the physical view."

Q On October 2nd, 1989, the date that Mr. Pratt's contract at UDOT was terminated, some of your staff were also terminated by UDOT, weren't they?

A I was informed that they would be terminated that same day.

Q In fact, they were actually terminated, weren't they?

A They were told that they would be terminated the day I contacted DOT, the following day, and they continued work.

Q You immediately contacted Mr. Christensen at UDOT, didn't you?

A I called Mr. Harold Worrall first. I tried -- attempted Mr. Christensen and he had gone home for the day.

Q And the next day you contacted Mr. Christensen?

A I did.

Q And your staff was then allowed back into UDOT that next day?

A Our agreement, when Mr. Christensen called me into his office the 2nd of October, the commitment was that our

1 people would be terminated in the shortest period of time  
2 possible and he asked me to work with our people and with his  
3 staff to come to a logical conclusion as rapidly as possible  
4 in either phase or task and our people would no longer work  
5 there.

6 Q In any event, you didn't have to resolve anything  
7 with Mr. Pratt before you could get your people back into  
8 UDOT, did you?

9 A I did not.

10 Q When you joined UDOT in 1980, Mr. Findlay was  
11 comptroller at UDOT; is that correct?

12 A That is correct.

13 Q Is that when you met Mr. Findlay?

14 A Yes, it is.

15 Q And you first met --

16 A I'm sorry, I take it back. I met him about six  
17 months to a year earlier than that when I was with the U.S.  
18 Department of Transportation for some period of time.

19 Q And you worked under Mr. Findlay when you first  
20 joined the Utah Department of Transportation, didn't you?

21 A I did not.

22 Q Who did you work under?

23 A I worked in a dual reporting responsibility to the  
24 director, Mr. Bill Hurley, and to the Utah Transportation  
25 Commission.

bitter, he had some negative words about our company, and I asked our employees that it would be best if they stayed away from him because his attitude was not the best and I told them that he did not care for Pro-Star.

Q You're not aware of anything bad that John Pratt's done or that you would consider bad, are you?

A I'm not.

Q You never told anybody that John Pratt's done anything bad, have you?

A No, I have not.

MR. BROADBENT: Your Honor, we move to admit Exhibits 30 through 32.

THE COURT: Any objection?

MR. OLSON: None, your Honor.

THE COURT: Very well, they're received.

MR. BROADBENT: No further questions.

THE COURT: Before you start your cross-examination, if you intend to proceed in that fashion -- I presume you do.

MR. OLSON: Just a few clarifying questions.

THE COURT: We'll take a brief recess. Members of the jury, remember the admonition I've given you.

Court will take a 10-minute recess.

(Whereupon, a recess was taken.)

THE COURT: Jury, parties and counsel are present.



Tab 6

1 THE COURT: Objection as to foundation is  
2 sustained.

3 MR. BROADBENT: Could we approach the bench, your  
4 Honor?

5 THE COURT: Well, Counsel, let's not make too much  
6 of a habit of this. My reason for sustaining the objection  
7 is that we don't have any basis at this point to know when  
8 any conversation occurred that would lead us to conclude that  
9 it's relevant, so let's have further foundation as to when  
0 the conversation that's going to be testified to occurred.

1 Q (By Mr. Broadbent) Okay. When did the conversa-  
2 tion take place, Mr. Clawson?

3 A Probably in late February, early March.

4 Q Okay, and tell us what Mr. McCoy said in that  
5 conversation.

6 MR. OLSON: Your Honor, I again object as to  
7 relevance in time. It's six months before the events that  
8 are at issue in this case.

9 THE COURT: Well, we're talking about February or  
0 March of 1989, at the time this witness was employed at Pro-  
Star?

MR. BROADBENT: That's correct.

THE COURT: Well, Counsel, I'm going to overrule  
the objection. You may testify.

THE WITNESS: We were on our way to one of the

1 clients in the state and the subject of John Pratt came up  
2 and the gist of the conversation was that Will was unhappy  
3 with John Pratt's conduct of terminating his contract and  
4 going to work directly for a client. He felt -- his comments  
5 were the frame that it was unethical and he was quite unhappy  
6 with John.

7 Q From being at Pro-Star in this two-month period,  
8 did you know where John Pratt was working before he termi-  
9 nated with Pro-Star?

10 A It was up at an office there on Social Hall Avenue.  
11 I believe it was the Department of Transportation or -- I'm  
12 not sure just what department at the time.

13 Q So you're not sure what department, but Mr. McCoy  
14 was upset because he thought that John Pratt had done some-  
15 thing wrong?

16 A Yes.

17 THE COURT: Counsel, there's no reason to restate  
18 the answer of a witness. He's your witness.

19 MR. BROADBENT: I have no further questions, your  
20 Honor.

21 THE COURT: All right, you may cross-examine.

22 MR. BROADBENT: Excuse me. Before we do that, I'd  
23 like to ask the witness to, if you would, place on this time  
24 line -- we'll use yellow -- the time frame in which this  
25 conversation with Mr. McCoy took place.

Tab 7

exception.

THE COURT: Sustained.

Q (By Mr. Broadbent) Did you later have any other conversations with Will McCoy in which John Pratt was mentioned?

A Yes, I did.

Q When was the next conversation that you remember having with him?

A I believe it was on May 3rd, 1989.

Q And what did Mr. McCoy say on that occasion about John Pratt?

A He was telling me that he believed that I should not have any dealings with Mr. Pratt because he believed that he was a bad influence on me.

Q Did he say anything else?

A He said that he had done several things that were professional unethical and that he -- he said that he could not elaborate, but he said that he had done things that were far worse than anything I knew about.

Q Did you know about anything unethical that Mr. Pratt had done?

A The only thing that I had known about that could even be construed in my mind as touching upon a lack of ethics was his transition from being a Pro-Star employee to a subcontractor.

1 both of them; isn't that right?

2 A Yes, he was -- he had been working overtime for  
3 Employment Security so he would have a reserve fund of time  
4 that could be used so that he could be satisfying both  
5 clients.

6 Q And when he left Employment Security, he left  
7 things in a lurch there, did he not?

8 A No, he did not.

9 Q So it didn't make any difference that the leader of  
10 Pro-Star's team at Employment Security was withdrawing from  
11 the project?

12 A No, it did not.

13 Q Worked just fine for you?

14 A Yes.

15 Q And Pro-Star never was concerned about that?

16 A Mr. McCoy never expressed any concern that  
17 Mr. Pratt had pulled out of Employment Security at the time  
18 that he did. He didn't express any concern to me.

19 Q Now, when Mr. Pratt or Mr. McCoy spoke with you in  
20 mid April of 1989 and asked you where John Pratt was working,  
21 at that time was it your understanding when he asked you that  
22 question, that he didn't know where John Pratt was working?

23 A It was.

24 Q Okay.

25 A He had --

Tab 8

Q Anything else that you remember from reading that?

A That is the point of this page.

Q Would you continue, if you would, down through your answer through line 15 on page 33, Mr. Christensen? Just read through that.

Does that further refresh your recollection about anything --

A Yeah.

Q -- that happened?

Tell us now what you remember.

A Well, Mr. McCoy stated that he didn't want a lawsuit with UDOT and UDOT didn't want to dirty their name up and they were just going to have a business arrangement to clear up the matter.

Q Okay. Now, you'd mentioned previously that you were out at the Utah Department of Transportation.

A Correct.

Q And how long were you there?

A Off and on for about three weeks.

Q In what time frame?

A September, I believe. I came back off my vacation September 1st or 2nd, I think, so it would be about September 5th.

Q Okay, and what were you working on when you were working out at UDOT?



Tab 9

1 circumstances was and I told him the same thing.

2           Shortly after that, or I think it was the same  
3 telephone conversation, I got a call -- I talked to Bill  
4 Basham who is the owner of Pro-Star/Prodata and at that time  
5 he indicated that he would take whatever means he could to  
6 get me out of UDOT.

7           Q     Now, after you stopped doing subcontract work for  
8 Pro-Star, did you continue then doing computer consulting  
9 work?

10          A     Yes, I did at UDOT.

11          Q     And did you have an arrangement or a contract with  
12 UDOT?

13          A     Yes.

14          Q     Did you have a contract with them?

15          A     Yes.

16          Q     And following this discussion that you just testi-  
17 fied about with Mr. McCoy and Mr. Basham on the telephone,  
18 was your contract with UDOT terminated?

19          A     Shortly thereafter, yes. There were some things  
20 that happened in the meantime, though, because I had inter-  
21 action and had interaction all along with my attorney con-  
22 cerning the legality of what I was doing and I was assured  
23 that it was perfectly legal.

24          Q     When was your contract at UDOT terminated?

25          A     On October 2nd, 1989.

Tab 10

1           Q     And as I recall, you've been in business both with  
2 him and with Bill Basham, who was now the president of  
3 Prodata; is that correct?

4           A     I was not a partner in that business. I was just  
5 an employee as they were.

6           Q     But you were all in that business together?

7           A     That's right.

8           Q     That was a consulting business; is that correct?

9           A     That's right.

10          Q     Mr. Worrall, I direct your attention now back to  
11 Plaintiff's Exhibit 6 that you've testified about, and you've  
12 indicated that this memo was prepared by you?

13          A     That's right, myself and Gary Williams, chief  
14 accountant.

15          Q     And it was prepared based upon your investigation  
16 of certain facts?

17          A     That's correct.

18          Q     Did anyone request that you prepare this memo?

19          A     Yes. Well, no, not the memo, but requested me to  
20 go back and look at the documents, as I indicated earlier.

21          Q     And that was Neal Christensen that requested that?

22          A     No, that was Will McCoy.

23          Q     So Will McCoy requested that you go and look at  
24 some documents, and as a result of that request, you did an  
25 investigation and prepared this memo which is Plaintiff's

1 Exhibit 6?

2 A That's correct.

3 Q I direct your attention for a moment to paragraph 2  
4 of this exhibit. Would you read that paragraph to the jury,  
5 please?

6 A "An existing contract between UDOT and Pro-Star was  
7 amended upward for an additional \$72,000 and extended from  
8 1-1-89 through 9-1-89. This was for ISS DP chargeback work,  
9 according to back-up contract documentation."

10 Q Wasn't there, in fact, an additional contract  
11 between UDOT and Pro-Star in effect at this time?

12 A Apparently there was, according to this.

13 Q And wasn't Pro-Star being paid under that other  
14 contract, as well as the one that you reference here that's  
15 been extended through September 1, 1989?

16 A You mean another contract other than mentioned here  
17 in this memo?

18 Q Yes.

19 A There was another contract with Pro-Star. I'm not  
20 sure what services it was for, though, I mean, what specific  
21 system.

22 Q As you sit here today, do you have a recollection  
23 whether that other contract had expired as of the date of  
24 this memo?

25 A I don't.

1           Q     Do you have a recollection as to whether Pro-Star  
2 was being paid under the other contract as of the date of  
3 this memo?

4           A     Which was September '89. I don't know whether that  
5 contract ran out June 30th or not.

6           Q     You have previously read to the jury paragraph 3  
7 of this memo. Would you take just a moment and look at that  
8 again?

9           A     Yes.

10          Q     The information that's in paragraph 3 didn't come  
11 from any documents that are on file at UDOT, did it?

12          A     No.

13          Q     In fact, the comptroller's office doesn't keep any  
14 documents that would give you that information, does it?

15          A     That's correct.

16          Q     That information, in fact, came from Mr. McCoy;  
17 isn't that correct?

18          A     I would think so. I don't recall exactly where we  
19 got that, but I'm sure that's probably the case.

20          Q     And you never reviewed any documents provided to  
21 you by Mr. McCoy in making those statements in paragraph 3?

22          A     No.

23          Q     And you never talked to John Pratt about any of the  
24 information in that paragraph before writing this memo?

25          A     I did not, no.

1           Q     Did anyone under your direction talk to Mr. Pratt  
2 before preparing this memo?

3           A     I'm not aware of it if they did.

4           Q     So in fact, you had really no way of knowing  
5 whether the statements in paragraph 3 of this memo were true,  
6 did you?

7           A     I didn't at that time.

8           Q     Looking now to paragraph 6 of this memo, you've  
9 previously read a portion of that paragraph and I won't have  
10 you read that again, but I'll direct your attention to the  
11 same place there beginning with the third sentence in para-  
12 graph 6.

13          A     Which begins?

14          Q     With, "John Pratt was employed with Pro-Star."

15          A     In paragraph 6?

16          Q     Yes. Do you see that? It's the third or probably  
17 the fourth. Maybe I'm missing a sentence.

18          A     Okay.

19          Q     Do you see the sentence that says, "John Pratt was  
20 employed with Pro-Star for a partial period"?

21          A     Yes.

22          Q     And that sentence, likewise, you had no documents  
23 that would indicate that that was the case, did you?

24          A     That's probably true.

25          Q     You never saw an employment contract between John

1 Pratt and Pro-Star, did you?

2 A Not at that time, no.

3 Q You never talked to John Pratt about his employment  
4 with Pro-Star?

5 A No.

6 Q So the only place you could have got this informa-  
7 tion would have been from Mr. McCoy; is that true?

8 A That, and I also had the assumption working in that  
9 business, the understanding that you have various noncompete  
10 clauses with various companies when you're under contract  
11 with them. You understand that situation and assume that to  
12 be the case. Kind of standard.

13 Q Now, this sentence -- and maybe I'm not reading it  
14 the same way you intended it, but this sentence, as I under-  
15 stand it, doesn't refer to any noncompete provision, and you  
16 correct me if I'm wrong. Doesn't this sentence say that John  
17 Pratt was employed during the same period of time that he was  
18 rendering services for UDOT, that he was employed by Pro-Star  
19 during that same period of time?

20 A Partial period, right.

21 Q So that's not referring to a noncompete clause, is  
22 it?

23 A I'm not sure whether it would or not. Depends on  
24 whether he was a subcontractor or whether he was an employee  
25 or what their arrangements were.



1 Q And that's not spelled out here in this paragraph  
2 anywhere?

3 A No.

4 Q Or anywhere else in the memo?

5 A No. My major concern was with the contractual  
6 arrangements and the payments that we made as Utah Department  
7 of Transportation, not John Pratt or Ron Hartle or Prodata,  
8 for that matter.

9 Q And so you really had no way of knowing whether  
10 this statement about John Pratt's employment in paragraph 6  
11 was true, did you?

12 A That's true, probably true.

13 Q And this memo was provided to Mr. Findlay?

14 A That's correct.

15 Q And it was provided so that he could then use this  
16 information to make some decision about this matter; is that  
17 correct?

18 A The major thing that I had a responsibility to do  
19 was to point out the facts of the contractual arrangements  
20 and the payment to the executive director of the Department  
21 for his action. Once I became aware of this, had I not acted  
22 and an auditor came along behind and found this sort of  
23 contractual arrangement going and this sort of payment  
24 process going on, I'd be in severe difficulties with the  
25 statutory authority as comptroller.

Tab 11

INSTRUCTION NO. 20

To prove intentional misrepresentation, the plaintiff must prove by clear and convincing evidence:

1. That the defendants made a false statement about a presently existing fact.

2. That the defendants knew the statement to be false, or recklessly made the statement without sufficient knowledge.

3. That the defendants intended to induce the Utah Department of Transportation to act in reliance on the false statement.

4. That the Utah Department of Transportation did in fact act with justification on the false statement.

Intentional misrepresentation is never presumed. It is a wrong of such a nature that merely speculative evidence or even the simple preponderance of evidence already discussed will not suffice. Each element of intentional misrepresentation must be proven by evidence that is clear and convincing. Such proof makes the existence of a fact not just more probable than not, but highly probable. Clear and convincing evidence is precise and undubitable, unmistakable and free from serious or substantial doubt. It carries with it not only the power to persuade the mind as to the truth or probable correctness of the fact it purports to prove, but has the element of clinching

INSTRUCTION NO. 20  
Page Two

in the mind such truth or correctness. Clear and convincing evidence of intentional misrepresentation instantly tilts the scales in the affirmative, when weighed against the evidence in opposition, and, your minds as finders of the facts are left with an abiding conviction that the charges as to each element of ~~intentional misrepresentation~~ *intentional misrepresentation* are true.

If the plaintiff fails to establish by clear and convincing evidence any one of these facts, then you must find that there was no intentional misrepresentation.

INSTRUCTION NO. 21

The actionable false statement must relate to a presently existing fact. The mere expression of a judgment or an opinion cannot serve as the basis for a finding of intentional misrepresentation. The plaintiff has the burden of proving this element of intentional misrepresentation by clear and convincing evidence. If you find that the defendants only stated their honest opinion or judgment to the Utah Department of Transportation, then the plaintiff has failed to prove actionable intentional misrepresentation.

INSTRUCTION NO. 22

The false statement must be made with knowledge of or reckless disregard for its falsity. If you find that the defendants had no knowledge of the falsity of any statement made to the Utah Department of Transportation and did not act with reckless disregard for the truth of such statement, then the plaintiff has failed to prove an intentional misrepresentation.

INSTRUCTION NO. 23

The plaintiff must prove by clear and convincing evidence that the defendants intended to induce the Utah Department of Transportation to act in reliance on their false statement. In other words, the defendants, in communicating with UDOT, must have intended to cause UDOT to rely on the allegedly false statement. If you find that the plaintiff has not proven by clear and convincing evidence that the defendant acted with such an intent, then the plaintiff has failed to prove intentional misrepresentation.

INSTRUCTION NO. 24

The plaintiff must prove by clear and convincing evidence that any reliance of the Utah Department of Transportation on the false information was actual and justifiable. Proof that UDOT made an independent investigation, unhindered by the defendants, regarding those facts allegedly misrepresented by the defendants contradicts the fact proposition that UDOT actually relied upon the defendants' statements. Further, where the means to discover the truth of an alleged misstatement lies in the hands of the person allegedly deceived and ordinary prudence would have uncovered the truth, reliance is not justifiable. If you find that any alleged reliance was not actual and justifiable, then the plaintiff has failed to prove an intentional misrepresentation.